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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

NO. 83-6766

JOE HAYES, PETITIONER

V.

STATE OF FLORIDA, RESPONDENT

ON PETITION FOR WRIT OF CERTIORARI
TO THE FLORIDA DISTRICT COURT OF APPEAL
FOR THE SECOND DISTRICT

RESPONDENT'S BRIEF IN OPPOSITION

JIM SMITH
ATTORNEY GENERAL

WILLIAM I. MUNSEY, JR.
Assistant Attorney General
1313 Tampa Street, Suite 804
Park Trammell Building
Tampa, Florida 33602
(813) 272-2670

Counsel for Respondent

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QUESTION PRESENTED

Petitioner presents the following question for review:

> Whether *DAVIS v. MISSISSIPPI*, *394 U.S. 721 (1969)*, prohibits a warrantless, non-consensual detention of a citizen, undertaken without probable cause, for the purpose of obtaining that citizen's fingerprints for comparison with prints found at the scene of a crime, and whether *TERRY v. OHIO*, *392 U.S. 1 (1968)*, may be extended to permit such detentions?

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OPINION BELOW

The Respondent, State of Florida, respectfully requests that this Court deny the petition for writ of certiorari, seeking review of the Florida Second District Court of Appeal's opinion in this case. That opinion (a copy of which is attached to the petition) is reported as *HAYES v. STATE, 439 So.2d 896 (FLA. 2d DCA 1983) reh. den. November 2, 1983, pet. for rev. den. 447 So.2d 886 (FLA. 1984).*

JURISDICTION

The jurisdictional requisites are adequately set forth in the petition; and, Respondent does not question the jurisdictional statement.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The pertinent Constitutional and Statutory provisions are set forth in the petition.

STATEMENT OF THE CASE

Respondent accepts Petitioner's statement of the case.[1/]

REASON WHY THE WRIT SHOULD BE DENIED

(1) The primary guide as to whether a case merits review is set forth in Supreme Court Rule 19. Here Petitioner fails to carry his burden in demonstrating that the state court decided *HAYES* is a manner not in accord with applicable decisions of this Court. The thrust of Petitioner's argument is that the state court decided an important question of federal law which should be settled by this Court.

1/ The appendix attached hereto is the complete trial testimony of the rape victim, Julianne Hollander. References to the appendix are made by the symbol "R" followed by record pagination.

Petitioner overlooks that *DAVIS v. MISSISSIPPI, 394 U.S. 721 (1969)* was decided thirteen years ago. The question this court left open addresses the topic of a detention solely for the purpose of obtaining fingerprints:

> Detentions for the sole purpose of obtaining fingerprints are no less subject to the constraints of the Fourth Amendment. It is arguable, however, that, because of the unique nature of the fingerprinting process, such detentions might, under narrowly defined circumstances, be found to comply with the Fourth Amendment even though there is no probable cause in the traditional sense. See Camara v Municipal Court, 387 US 523, 18 L Ed 2d 930, 87 S Ct 1727 (1967). Detention for fingerprinting may constitute a much less serious intrusion upon personal security than other types of police searches and detentions. Fingerprinting involves none of the probing into an individual's private life and throughts that marks an interrogation or search. Nor can fingerprint detention be employed repeatedly to harass any individual, since the police need only one set of each person's prints. Furthermore, fingerprinting is an inherently more reliable and effective crime-solving tool than eyewitness identifications or confessions and is not subject to such abuses as the improper line-up and the "third degree." Finally, because there is no danger of destruction of fingerprints, the limited detention need not come unexpectedly or at an inconvenient time.
>
> [394 US 728]
>
> For this same reason, the general requirement that the authorization of a judicial officer be obtained in advance of detention would seem not to admit of any exception in the fingerprinting context.
>
> We have no occasion in this case, however, to determine whether the requirements of the Fourth Amendment could be met by narrowly circumscribed procedures for obtaining, during the course of a criminal investigation, the fingerprints of individuals for whom there is no probable cause to arrest.
>
> (text of 394 US at 727-728)

Significantly, the dissent of Justice Stewart came to pass:

> At the original trial the victim of the rape, under oath, positively identified the petitioner as her assailant. There now exists, therefore, ample probable cause to detain him and take his fingerprints.
>
> (id at 730)

As predicted by Justice Stewart, Davis was convicted on retrial. *DAVIS v. STATE, 255 So.2d 916 (MISS. 1971), cert. denied, DAVIS v. MISSISSIPPI, 409 U.S. 855 (1972).* In the foundation case Petitioner asserts as a basis for review, the defendant's identity would never had been known but for the unlawful arrest. The second conviction was affirmed because the victim was able to identify Davis without the use of any evidence which evolved from the unlawful arrest. In this case, Julianne Hollander (the victim: a 51 year-old bank teller), gave graphic testimony as to assailant's statements: "I want to feel your cunt" and "One scream out of you, lady, and you're dead." (R 283) Mrs. Hollander testified as to both vaginal and anal penetration. (R 283, 284) The victim made positive in-court identification of Petitioner. (R 287) So it follows in this case, as in *DAVIS v. MISSISSIPPI, supra,* a retrial would result in a second conviction. Here, the victim withstood a brutal, traumatizing cross-examination attacking her past recollection as to Petitioner's identity. Attached hereto as Appendix is a complete copy of the victim's testimony in state court.

(2) Respondent would point out that neither the decision below nor the state court record proper raises the question posed by Petitioner. Petitioner continues in his assertion that he did not effectively consent to accompany police for fingerprinting. By clear and convincing evidence the state trial court found that Petitioner accepted an invitation to accompany the detective to the police station for fingerprinting. This was a factual determination made by state court affirmed on appeal. *HAYES v. STATE, supra at 903.* Petitioner was never arrested until after a preliminary comparison of his prints and latent prints found at the crime scene indicated a match.

(3) The Florida Second District Court of Appeals has rendered a decision which does not conflict with decisions of other courts of appeal on the same matter. Judge Campbell in writing the *HAYES* opinion sets forth four cases (three of which this Court denied certiorari) which address similar situations to the instant one from which the state appellate court concluded that the fingerprints had been lawfully seized. See, *UNITED STATES v. MCCARTHY, 297 F.2d 183 (7th CIR. 1961) cert. denied, 369 U.S. 850 (1962); UNITED STATES v. SANDERS, 477 F.2d 112 (5th CIR. 1973) cert. denied, 414 U.S. 870 (1973); UNITED STATES v. HARRIS, 453 F.2d 1317 (8th CIR. 1972) cert. denied, 412 U.S. 927 (1973); and, UNITED STATES v. SECHRIST, 640 F.2d 81 (7th CIR. 1981).* These decisions leave no doubt that such a minimal intrusion on Petitioner did not infringe on his Fourth Amendment rights.

(4) It has been thirteen years since this Court left open the question posed in *DAVIS v. MISSISSIPPI, 394 U.S. 721 (1969).* To be candid, there is a real scarcity of cases where citizens are asked to consent to warrantless detentions so that their fingerprints might be lifted to be compared with those found at a crime scene. The facts are narrow; and, the holding is restricted to them. To suggest that *TERRY v. OHIO, 392 U.S. 1 (1968)* be extended to permit such detentions is logical. These narrow facts reflect such a minimal intrusion upon a citizen that there is no Fourth Amendment deprivation. However, to suggest that judicial authorization or approval be required in circumstances such as this stage of a criminal investigation would render *TERRY* a nullity. To grant certiorari jurisdiction on these narrow facts would not settle an important constitutional principle.

CONCLUSION

For the foregoing reasons in opposition, the Petition for Writ of Certiorari should be denied.

APPENDIX

[Copy of trial testimony of Julianne Hollander, the rape victim is appended hereto.]

Respectfully submitted,

JIM SMITH
ATTORNEY GENERAL

WILLIAM I. MUNSEY, JR.
Assistant Attorney General
1313 Tampa Street, Suite 804
Park Trammell Building
Tampa, Florida 33602
(813) 272-2670

Counsel for Respondent

CERTIFICATE OF SERVICE

I, William I. Munsey, Jr., a member of the Bar of the Supreme Court of the United States and counsel of record for the State of Florida, Respondent herein, hereby certify that on August 10, 1984, pursuant to Rule 46.5, Rules of the Supreme Court, I served one copy of the foregoing Brief in Opposition to Petition for Writ of Certiorari on Joe Hayes, Petitioner herein, by depositing such copy in the United States Post Office, Tampa, Florida, with first class postage prepaid, properly addressed to the post office address of Michael E. Raiden, Esquire, the above-named Petitioner's counsel of record, at Office of the Public Defender, Hall of Justice Building, 455 North Broadway Avenue, Bartow, Florida 33830.

All parties required to be served have been served.
Dated August 10, 1984.

WILLIAM I. MUNSEY, JR.
Assistant Attorney General
OF COUNSEL FOR RESPONDENT